No. 84-712

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

VIRGIA AYERS, W. C. MEADERS, JR., BOYCE BLACKMON AND JOE ACKER,

Petitioners,

v.

SPARTAN GRAIN & MILL COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) 3

Graphic Products Distributors v. Itek Corp., 717 F2d 1560 (11th Cir. 1983) 3

Jefferson Parish Hosp. Dist. No. 2 v. Hyde ___, ____ U.S. ____, 104, S.Ct. 1551 (1984) 4

Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284 (11th Cir. 1984) 2

United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610 (1977) 4

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The jury found that other firms could have offered an independent program for the production of hatching eggs "if they had elected to do so". From an accounting standpoint, a Ralston Purina can offer any program it elects, particularly if it is willing to lose money.

The testimony was replete, however, that by offering an independent program, Spartan's competitors would have sacrificed certain efficiencies of integration. They did not offer an independent program, therefore, because "it was not econmically attractive." Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284, 1287 (11th Cir. 1984) (emphasis supplied). As Spartan's economic expert testified, integrated firms "wouldn't have touched that kind of a program at all."

Accordingly, whether others could have offered an independent program "if they had elected to do so" is irrelevant for two reasons. First, proof of economic power does not require proof of insurmountable barriers to entry. To establish that no competitor could have offered an independent program would have been to

establish Spartan's absolute monopoly power, a standard of proof which tie-in cases do not require. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502-04 (1969).

Second, the question fails to distinguish between accounting costs and economic costs. From an accounting standpoint, Ralston Purina's great size may or may not afford it market power. From an economic standpoint, the "economic advantage" which the jury found that Spartan enjoyed "over its competitors" clearly did afford it market power.

Otherwise, Spartan would have been unable "to raise price significantly above the competitive level . . . ." Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1570 (11th Cir. 1983). Spartan would have been unable to use its tie-in

"to facilitate price discrimination. ..." United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 617 (1977). Spartan would have been unable to "force" burdensome terms on producers. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, _____ U.S. _____ , 104 S.Ct. 1551, 1558-59 (1984). Spartan would have been unable "to induce [its] customers for one product to buy a second product from [it] that would not otherwise have been purchased solely on the merit of the second product." Id, 104 S.Ct. at 1559 n. 20.

Respectfully submitted,

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